

E-FILED on 1/6/2012IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION12 DONNA BERNARDI, an individual,  
13 SMITESH PARMAR, an individual,14 Plaintiffs,  
15 v.  
16 JPMORGAN CHASE BANK, N.A., F/K/A  
17 WASHINGTON MUTUAL BANK, F.A.; and  
Does 1-10, inclusive,  
18 Defendants.No. C-11-04543 RMW  
ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO DISMISS  
FIRST AMENDED COMPLAINT  
[Re Docket No. 10]

19 Defendant JPMorgan Chase Bank, N.A. ("JPMorgan") moves to dismiss plaintiffs' first  
20 amended complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs oppose  
21 the motion. On January 6, 2012, the court held a hearing to consider defendant's motion. Having  
22 considered the papers submitted by the parties and the arguments of counsel, and for the reasons set  
23 forth below, the court grants in part and denies in part defendant's motion to dismiss.

**I. BACKGROUND**

24 In May 2006, plaintiffs Donna Bernardi and Smitesh Parmar entered into a mortgage loan  
25 transaction with Washington Mutual Bank ("WMB") to acquire residential property located in Ben  
26 Lomond, California. FAC ¶ 1. Plaintiffs executed a promissory note in favor of WMB in the  
27 amount of \$620,000, secured by a deed of trust. *Id.* On September 25, 2008, JPMorgan executed a

28 ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS FIRST AMENDED COMPLAINT—No.  
C-11-04543 RMW  
LJP

1 Purchase and Assumption Agreement ("P&A Agreement") with the Federal Deposit Insurance  
 2 Corporation acting as receiver of WMB. Dkt. No. 11 Exh. 5.<sup>1</sup> The P&A Agreement transferred to  
 3 JPMorgan "all right, title, and interest of the Receiver in and to all of the assets" of WMB and its  
 4 subsidiaries, and provided that JPMorgan "specifically purchases all mortgage servicing rights and  
 5 obligations of [WMB]." *Id.* § 3.1.

6 Plaintiffs allege that "shortly after the origination of the loan," their loan was sold by WMB  
 7 to unknown entities. *Id.* ¶ 15. Defendants and these unknown entities attempted to securitize  
 8 plaintiffs' loan into a securitized trust, but they failed to follow the requirements of the agreement  
 9 that governed the creation of the trust. *Id.* ¶ 16. Thus, plaintiffs allege, the loan was never a part of  
 10 the trust res, "render[ing] Defendants third-party strangers to the underlying debt obligation without  
 11 the power or right to demand payment, declare default, negotiate their Loan, and foreclose on their  
 12 Property." *Id.* Plaintiffs further allege that defendants are aware of this fact but continue to act as if  
 13 they have authority to service the loan. *Id.*

14 Plaintiffs state they do not dispute that they owe money on their mortgage obligation but they  
 15 dispute the amount owed and seek judicial assistance in determining the true creditor. *Id.* ¶ 24.  
 16 Plaintiffs have made payments to JPMorgan, as well as sought loan modification by JPMorgan and  
 17 sent a Qualified Written Request letter asking for the identity of the owner of the mortgage note. *Id.*  
 18 ¶¶ 17, 23, 27. Plaintiffs allege in the alternative that, even if JPMorgan is a successor in interest to  
 19 the deed of trust, it has failed to properly apply plaintiffs' mortgage payments, resulting in improper  
 20 taxes and fees being added to the loan balance. *Id.* ¶¶ 133, 135.

21 Plaintiffs filed the present action in this court on September 13, 2011. Upon defendant's  
 22 motion to dismiss the original complaint, plaintiffs filed the FAC as a matter of right on November  
 23

---

24 <sup>1</sup> The court takes judicial notice of the P&A Agreement, which is available on the FDIC's website.  
 25 See Fed. R. Evid. 201 (courts may take judicial notice of facts "capable of accurate and ready  
 26 determination by resort to sources whose accuracy cannot reasonably be questioned"); *Molina v.*  
*Washington Mut. Bank*, No. 09-CV-00894, 2010 WL 431439, at \*3 (S.D. Cal. Jan. 29, 2010) (taking  
 27 judicial notice of the WMB-Chase P&A Agreement); *Tanavusa v. FDIC*, 2009 WL 3108568 at \*1  
 28 n.1 (C.D. Cal. 2009) (same). However, as plaintiffs point out, judicial notice of matters of public  
 record is limited to the existence and authenticity of a document; the veracity and validity of the  
 contents remain open to dispute. See *Team Enters., LLP v. W. Inv. Real Estate Trust*, 2009 WL  
 1451635 at \*3-4 (E.D. Cal. 2009).

1 3, 2011. The FAC asserts claims for declaratory relief, negligence, quasi-contract, violation of 15  
2 U.S.C. § 1692(e) of the Fair Debt Collection Practices Act ("FDCPA"), violation of 12 U.S.C.  
3 § 2605 of the Real Estate Settlement Procedures Act ("RESPA"), violation of Cal. Bus. & Prof.  
4 Code § 17200 *et seq.* ("UCL"), accounting, quiet title, breach of contract, and breach of the implied  
5 covenant of good faith and fair dealing.

## 6 II. ANALYSIS

### 7 A. Standing to Enforce Plaintiffs' Debt

8 Most of plaintiffs' claims turn on the assertion that JPMorgan does not have the authority to  
9 enforce plaintiffs' debt obligation. However, plaintiffs have not alleged facts that plausibly support  
10 this assertion. Plaintiffs admit they are not claiming JPMorgan was deprived of any interest in the  
11 loan simply because the loan was securitized. Opp. at 9. Rather, plaintiffs' theory is that the  
12 purported assignment of the loan into the securitized trust is void due to failure to follow the trust  
13 agreement and New York trust law. *Id.* at 9-10. Plaintiffs explicitly allege that "their Loan was not  
14 assigned, transferred, or granted to the Sponsor, Depositor, the Trustee of the Securitized Trust, or  
15 any of the Defendants, as required by the Trust Agreement." Compl. ¶ 20. But if the loan was never  
16 properly assigned to another entity, then it remained part of WMB's assets, which JPMorgan  
17 acquired through the P&A Agreement. Plaintiffs have not alleged a theory under which their debt  
18 obligation ended up in the possession of a third party rather than JPMorgan. Nor do plaintiffs allege  
19 that any third party has ever come forward attempting to enforce the debt, making plaintiffs' claim  
20 yet more implausible.

21 Because plaintiffs have not adequately pled that JPMorgan lacks standing to enforce the  
22 debt, plaintiffs' claims must be dismissed to the extent they rely on this assertion. Thus, plaintiffs'  
23 first, third, fourth, seventh, and eighth causes of action are dismissed in their entirety, and plaintiffs'  
24 second cause of action is dismissed in part. Since this is the first time plaintiffs' claims are being  
25 dismissed, the court will allow plaintiffs to amend their complaint and attempt to allege facts  
26 showing that JPMorgan lacks standing to enforce the debt.

**1           B.     Improper Application of Mortgage Payments**

2           Plaintiffs claim, in the alternative, that JPMorgan failed to follow the terms of the deed of  
3 trust specifying the order of priority for applying mortgage payments. Defendant argues that  
4 plaintiffs' contract claims contradict their allegation that defendant has no rights with respect to the  
5 loan. However, "[a] party may state as many separate claims or defenses as it has, *regardless of*  
6 *consistency.*" Fed. R. Civ. P. 8(d)(3) (emphasis added); *see also Taylor v. Pathmark Stores, Inc.*,  
7 177 F.3d 180, 189 (3d Cir. 1999) ("[A] plaintiff may plead in the alternative, and our caselaw finds  
8 no difficulty with pairing the two claims in one complaint."); *Marcella v. ARP Films, Inc.*, 778 F.2d  
9 112, 117 (2d Cir. 1985) (finding plaintiff could properly submit his case on both a contract claim  
10 and a *quantum meruit* claim). Plaintiffs have sufficiently alleged their alternative theory that a  
11 contractual relationship exists between them and JPMorgan as successor in interest to the deed of  
12 trust. Plaintiffs also provide the terms of the contract by attaching the deed of trust and allege  
13 breach in that JPMorgan did not credit payments in the required order of priority.

14           Defendant next argues that, under the P&A Agreement, it did not assume any liability for  
15 borrower claims against WMB for conduct prior to September 25, 2008. However, plaintiffs allege  
16 that they made payments directly to JPMorgan and that it was JPMorgan, not WMB, who failed to  
17 properly account for the payment. *E.g.*, FAC ¶¶ 27-28, 118, 135. Thus, the provision in the P&A  
18 Agreement is inapplicable.

19           Finally, defendant argues that plaintiffs fail to allege performance and have breached the  
20 deed of trust by failing to make payments on the loan. In order to succeed on a claim for breach of  
21 contract, plaintiffs "must be free from substantial default" and hence "must plead and prove  
22 performance or tender on [their] part or an excuse for performance." 1 B.E. Witkin, *Summary of*  
23 *California Law, Contracts*, § 848, p. 935 (10th ed. 2005). Plaintiffs do allege that they "substantially  
24 performed all of their conditions in the Deed of Trust," FAC ¶ 134, in addition to alleging that they  
25 made payments that were not properly credited. At the same time, plaintiffs make references to  
26 being "push[ed] . . . into foreclosure" and the "imminent foreclosure" of their home, *id.* ¶¶ 19, 41,  
27 which suggests they have not been able to keep up with loan payments. While the allegations of  
28 performance are marginal, the court finds it inappropriate to resolve at this stage the factual issue of

1 whether plaintiffs are in default. Thus, the motion to dismiss plaintiffs' breach of contract claim is  
2 denied.

3 Plaintiffs also assert a breach of the implied covenant of good faith and fair dealing, alleging  
4 that defendant's improper application of payments, and the resulting addition of interest and  
5 improper fees, rendered it impossible for plaintiffs to carry out their obligations under the contract.  
6 To support a claim for breach of the implied covenant, the allegations

7 must show that the conduct of the defendant, whether or not it also constitutes a  
8 breach of a consensual contract term, demonstrates a failure or refusal to discharge  
9 contractual responsibilities, prompted not by an honest mistake, bad judgment or  
negligence but rather by a conscious and deliberate act, which unfairly frustrates the  
agreed common purposes and disappoints the reasonable expectations of the other  
party thereby depriving that party of the benefits of the agreement.

10 *Careau & Co. v. Security Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990). "If the  
11 allegations do not go beyond the statement of a mere contract breach and, relying on the same  
12 alleged acts, simply seek the same damages or other relief already claimed in a companion contract  
13 cause of action, they may be disregarded as superfluous as no additional claim is actually stated."  
14 *Id.* Here, plaintiffs do not allege any facts beyond JPMorgan's failure to properly apply payments,  
15 and they allege the same damages on both claims, FAC ¶¶ 138, 149. Thus, plaintiffs' claim for  
16 breach of the implied covenant is dismissed as superfluous.

17 As to the contract-based part of their negligence claim, plaintiffs have failed to allege that  
18 they were owed a duty of care. Plaintiffs acknowledge that "[n]ormally lenders and servicers do not  
19 owe a borrower a duty of care" but claim that "a bank may be liable in negligence if it fails to  
20 discharge its contractual duties with reasonable care." FAC at 12 n.6 (citing *Das v. Bank of Am.*,  
21 186 Cal. App. 4th 727, 741 (2010)). *Das*, however, simply continues a line of cases finding that  
22 banks have a duty to act with reasonable care in its transactions with *depositors*. See *Das*, 186 Cal.  
23 App. 4th at 741 ("[A] bank can be subject to tort liability to a depositor for misconduct in connection  
24 with an account."); *Chazen v. Centennial Bank*, 61 Cal. App. 4th 532, 543 (1998) ("It is well  
25 established that a bank has 'a duty to act with reasonable care in its transactions with its  
26 depositors....'" (quoting *Bullis v. Security Pac. Nat'l Bank*, 21 Cal.3d 801, 808 (1978))). Plaintiffs  
27  
28

1 have not cited, nor has the court found, any cases extending a similar duty to the relationship  
2 between banks and borrowers. Thus, the remainder of plaintiffs' negligence claim is dismissed.

3 **B. Violation of the Fair Debt Collection Practices Act**

4 The FDCPA provides that "[a] debt collector may not use any false, deceptive, or misleading  
5 representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. A debt  
6 collector is "any person who uses any instrumentality of interstate commerce or the mails in any  
7 business the principal purpose of which is the collection of any debts, or who regularly collects or  
8 attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."  
9 *Id.* § 1692a(6). However, specifically excluded from the definition are collection efforts "to the  
10 extent such activity . . . concerns a debt which was not in default at the time it was obtained." *Id.*  
11 § 1692a(6)(F)(iii). Plaintiffs fail to allege that JPMorgan acted as a debt collector in attempting to  
12 collect payments on plaintiffs' debt obligation. First, plaintiffs have not alleged that JPMorgan  
13 regularly collects debts on behalf of third parties or that it is in the business of debt collection.  
14 Second, plaintiffs allege they made payments to JPMorgan, suggesting their debt was not in default  
15 at the time JPMorgan began collection efforts.

16 Finally, plaintiffs fundamentally misunderstand the FDCPA in asserting that their claims are  
17 "based on the most basic requirement of the FDCPA: that a creditor collecting payment must be a  
18 true creditor entitled to collect payment." Opp. at 13. The FDCPA applies to debt collectors, not to  
19 creditors, and "the status of debt collector or creditor is mutually exclusive." *Schlegel v. Wells*  
20 *Fargo Bank, N.A.*, 799 F. Supp. 2d 1100, 1103 (N.D. Cal. 2011). Plaintiffs apparently concede that  
21 JPMorgan's conduct was akin to that of a creditor, not a debt collector. *Cf. id.* at 1105 (finding  
22 FDCPA did not apply because defendant's activity was "more debt servicing than debt collection").  
23 Although plaintiffs seek to challenge JPMorgan's status as a creditor, and defendant's conduct may  
24 be wrongful if it in fact lacks standing, plaintiffs have not shown how JPMorgan's conduct could be  
25 wrongful *under the FDCPA*. Thus, in addition to the reason discussed in section II.A above,  
26 plaintiffs' fourth cause of action must be dismissed for this additional reason.

1                   **C.       Violation of the Real Estate Settlement Procedures Act**

2                   Defendant argues that plaintiffs fail to allege facts establishing a RESPA violation and  
3                   additionally fail to allege damages that are causally connected to the violation. RESPA requires the  
4                   servicer of a federally related mortgage loan to acknowledge receipt of a qualified written request  
5                   ("QWR") and to take appropriate substantive action within specified periods of time. 12 U.S.C.  
6                   § 2605(e). Failure to comply results in liability to the borrower for actual damages and "any  
7                   additional damages, as the court may allow, in the case of a pattern or practice of noncompliance."  
8                   *Id.* § 2605(f)(1). Plaintiffs allege that they sent a QWR to JPMorgan on October 19, 2010 and that  
9                   JPMorgan failed to acknowledge receipt or provide a substantive response within the required time  
10                  periods. FAC ¶¶ 74, 77-78. Plaintiff also alleges that the QWR contained information in  
11                  conformance with 12 U.S.C. § 2605(e)(1)(B). FAC ¶ 76. Although these allegations do little more  
12                  than track the statutory language, the court finds them sufficient to support a claim under RESPA.  
13                  Since plaintiffs allege a complete failure to act on the part of JPMorgan, it is unclear what additional  
14                  factual detail they could provide, and defendant does not identify any specific deficiencies.

15                  Plaintiffs have also sufficiently alleged that they have suffered actual damages with a causal  
16                  relationship to the RESPA violation. For example, plaintiffs allege that they have overpaid interest  
17                  on their loan, FAC ¶ 83, which logically flows from defendant's alleged failure to make appropriate  
18                  corrections to plaintiffs' account, FAC ¶ 81. Plaintiffs also allege "costs associated with removing  
19                  the cloud on their property title and setting aside the trustee's sale," FAC ¶ 83, which could plausibly  
20                  have been avoided if defendant had provided the requested information regarding the identity of the  
21                  owner of plaintiffs' note. Contrary to defendant's assertion, plaintiffs need not allege a pattern and  
22                  practice of non-compliance for a RESPA claim to lie. Such a showing is needed only if a plaintiff is  
23                  seeking to recover statutory damages. *See* 12 U.S.C. § 260(f)(1); *Lal v. Am. Home Mortg. Servicing,*  
24                  *Inc.*, 2009 WL 3126450 at \*3 (E.D. Cal. 2009) (denying motion to dismiss claim for actual damages  
25                  while dismissing claim for statutory damages). Because plaintiffs' allegations, if true, would support  
26                  recovery of at least actual damages, defendant's motion to dismiss the RESPA claim is denied.

27

28

1           **D.     Violation of Cal. Bus. & Prof. Code § 17200**

2           As discussed above, plaintiffs fail to adequately allege their theory that JPMorgan lacks  
3 authority to enforce their debt obligation. As such, much of plaintiffs' UCL claim fails. However,  
4 as just discussed, plaintiffs have sufficiently alleged a RESPA violation and resulting damages,  
5 which can support a claim under the unlawful prong of the UCL. Thus, defendant's motion to  
6 dismiss the UCL claim is denied.

7           **III. ORDER**

8           For the foregoing reasons, the court grants in part and denies in part defendant's motion to  
9 dismiss. The first, second, third, fourth, seventh, eighth, and tenth causes of action are dismissed  
10 with leave to amend. The remainder of the motion to dismiss is denied. Plaintiffs have twenty (20)  
11 days from the date of this order to file an amended complaint.

12  
13  
14           DATED:     January 6, 2012

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*Ronald M. Whyte*  
RONALD M. WHYTE  
United States District Judge